90-32

No. _____

In The

Supreme Court of the United States

October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA, and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, BARBARA KING, DOROTHY ROBERTS, JACQUELINE ROSS, LINDA ISAAC, AND CHARLES STEWART

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INCREASE MINORITY PARTICIPATION BY AFFIRMATIVE CHANGE TODAY OF NORTHWEST FLORIDA, INC. (IMPACT), on behalf of itself and its members, Diann Walker, Louvenia Jones, Pearlie Williams, Gracie Holton, Rosa Henderson, Delores Colston, Charles Stewart, Barbara King, Dorothy Roberts, Plaintiffs-Appellants,

Jacqueline Ross, Linda Issac,
Intervenors-Appellants,

and

Clifford Simmons, Marguerite
Stewart, Plaintiffs,

v.

George FIRESTONE, as Secretary of
the State of Florida, State of
Florida, Defendants-Appellees.

INCREASE MINORITY PARTICIPATION BY AFFIRMATIVE CHANGE TODAY OF NORTHWEST FLORIDA, INC. (IMPACT), on behalf of itself and its members, Diann Walker, Louvenia Jones, Pearlie Williams, Gracie Holton, Rosa Henderson, Delores Colston, Charles Stewart, Barbara King, and Dorothy Roberts, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

Clifford Simmons and Marguerite
Stewart, Plaintiffs,

Jacqueline Ross and Linda Issac,
Intervenors-Appellants,

v.

George FIRESTONE, as Secretary of
State of the State of Florida, and State
of Florida, Defendants-Appellees.

Nos. 86-3623, 86-3727.

United States Court of Appeals,
Eleventh Circuit.

Feb. 6, 1990.

Organization and certain of its members filed civil rights action against the state of Florida, alleging racially discriminatory practices in the hiring and promotion of black persons by the state and its officials. The United States District Court for the Northern District of Florida, No. TCA 79-895-11, Maurice Mitchell Paul, J., decided all claims against plaintiffs, and they appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) defendants did not meet their burden of production in regard to articulation of legitimate nondiscriminatory reasons for employment decisions; (2) court did not abuse its discretion in rejecting testimony of plaintiffs' expert on ground that he was a political scientist, not a statistician or economist; and (3) plaintiffs had standing to raise issue of discriminatory nature of employment examination.

Reversed and remanded.

Edmondson, Circuit Judge, filed opinion concurring in part and dissenting in part.

Appeals from the United States District Court for the Northern District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal by the plaintiffs and intervenors from a judgment in a non-jury civil rights action in which

the trial court decided all claims against the plaintiffs and intervenors.

I. STATEMENT OF THE CASE

Plaintiff Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc. (IMPACT) on behalf of its members named in the title (*supra*), Clifford Simmons, and Marguerite Stewart, filed this civil rights action in 1979 against George Firestone as Secretary of State of the State of Florida and against the State itself, seeking injunctive and monetary relief from the alleged racially discriminatory practices of the defendants in hiring and promotions of black persons by the State and its officials.

The action was originally filed as a class action, was certified as such, and continued as such for approximately five years when the trial court decertified the class action, stating as a ground for doing so, that the record disclosed insufficient financing available to permit counsel properly to represent the class.[1]

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[1] The trial court based this decision on counsel's statement supporting a motion by plaintiffs to order prompt compliance with plaintiffs' interrogatories that had been pending for months at that time. Counsel stated that the cost of the litigation would amount to something between $30,000 and $50,000, whereas a court order requiring immediate compliance would save substantial amounts. The court referred to the $30,000 to $50,000 cost as the basis for decertifying the class, although counsel at that time stated that the finances supporting the claim had been substantially improved.

Subsequently, the trial court dismissed the plaintiffs' motion to require discovery of the examinations and tests and test scores of the plaintiff applicants and those of the successful employees. The plaintiffs later filed a motion to recertify the class which the court, after a hearing, denied. At the same time, it dismissed the organizational plaintiff, IMPACT, as a party to the litigation. The court held that IMPACT had no separate interest apart from that of the individual plaintiffs, and therefore, did not have standing.

The case was set for trial for March 28, 1986. On March 7, plaintiffs filed an emergency motion requesting the court to expedite its disposition of the pending motions requiring information regarding the employment examinations and other employment information. On March 26, the court held that employment tests were not an issue in the litigation but required that answers to some of the interrogatories be furnished.[2] This motion

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[2] The interrogatories which the court required to be answered asked for the following information:

a. Full name

b. Social security number

c. Address

d. Telephone number

e. Race

f. Sex

g. Positions applied for, or certified for

h. Date of each eligibility

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had been pending before the court for two years. The case went to trial on April 1.

Following the plaintiffs' case-in-chief, the court dismissed all disparate impact claims and dismissed the individual claims of Gracie Holton. The court issued its opinion styled "Findings of Fact and Conclusions of Law and Final Judgment" on August 11, 1986. In its memorandum, the court decided all claims against the plaintiffs and intervenors.

Much of the plaintiffs' proof was developed from the personnel records maintained by the defendants. The trial court did not decide whether, in any of the cases, the plaintiffs made out a prima facie case. However, the court proceeded to consider the defendants' *explanation* on the assumption that prima facie cases had been made out on all of the plaintiffs' claims.

The trial court stated:

> In this case the defendant *contends* that the person believed to be most qualified was hired unless friendship or political connections played some role. In every instance the defendant *denies* that race affected the decision. Making that statement satisfied the defendants' light burden [under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)].

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The court ordered: "Defendants are directed to provide plaintiffs with the register information concerning individuals who applied for positions with the Department of State or [in?] Leon County from 1972 to date."

II. SUMMARY OF FACTS

Without attempting to determine from the testimony and records introduced during the 11 day trial whether every plaintiff or intervenor made out a prima facie case, it is perfectly clear that all of the intervenors, proved that they were black employees, they had made applications for the specified positions, that the positions had been filled by another person, and that, in most if not all cases, that other person was white. Moreover, the proof adequately showed that each of the applicants was qualified for the position sought.[3] In each case, also, the position remained open after the plaintiff had been denied the appointment. In some of the personnel records introduced by the plaintiffs or the defendants, it is clear that with respect to either education, prior experience, or training, the applicant was superior to that of the successful applicant. It is also clear from some of the personnel records that the white applicant was superior on one or more of the same "qualifications." With respect to others, the plaintiffs offered no proof as to the relative qualifications of the successful applicant.

The defendants' principal personnel official, who was first employed by the defendant in 1984, after the case had been pending nearly five years, testified that it was the general practice of the defendant to hire the "most qualified" applicant. There was no testimony as to what the defendants considered as a "qualification." Nor

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[3] The personnel director for the defendants gave evidence that the only persons considered by the "selector" of the successful applicant were those who had already been determined to be qualified for the post.

was there even any testimony by any person who made the employment decision that the particular selectee was chosen as better qualified.

The plaintiff tendered its expert witness, Dr. Dyson, for the purpose of analyzing the evidence of employment actions by the defendants. His testimony, if it had been accepted by the trial court, was clearly sufficient to establish a statistical disparity between the employment actions taken in favor of black applicants as against those taken in favor of whites. However, the defendant also produced an expert witness who used a different benchmark and database than those used by plaintiffs' expert and the court determined that Dr. Dyson "was qualified to make the mathematical calculations he performed. However, Dr. Dyson is a political scientist, not a statistician or economist, and he testified about matters beyond his expertise." The court rejected Dr. Dyson's testimony in favor of that of the defendants' expert and rejected has statistical evidence.

The Assistant Secretary of State, testifying for the defendants, gave evidence that the final selection of each employee was intended to be, and actually was, subjective.[4] There was ample evidence in the record that the

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[4] On cross-examination, he was asked the question:

Q: Basically, the decision to hire after you get past the T and E process is a subjective one?

A: There is no doubt about that. Wherever individuals are involved, you have subjectivity.

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overwhelming proportion of the persons making the hiring decision were white persons.

III. ISSUES ON APPEAL

(1) Did the defendants properly articulate "a legitimate non-discriminatory reason" for the employment decisions when the trial court assumed that a prima facie case had been made out by the plaintiffs?

(2) Whether the trial court erred in not making a specific finding that a prima facie case had been made out, based on the expert testimony offered by plaintiffs.

(3) Whether the trial court erred in not recertifying the case as a class action.

(4) Did the trial court err in eliminating the employment examination issue?

(5) Did the court improperly dismiss the claims of plaintiff Holton?

These are the only claims we think merit attention on appeal.

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Q: And there is no real check on what the hiring people do except T and E?

A: In general, that's true.

The term "T and E" used in this quote refers to the original qualification for employment or promotion. All applicants must have satisfied the T and E before they could be considered.

IV. DISCUSSION

A. *Defendants' Burden of Production*

1. Underlying the entire judgment of the trial court is plaintiffs' contention that the trial court, once it assumed that prima facie cases had been made out by the plaintiffs and intervenors, erred in failing to require the defendants adequately to "articulate some legitimate, non-discriminatory reason" for its employment actions. The Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), carefully described the burden that shifts to the defendant once a prima facie case is made out. The Court there said:

> The burden that shifts to the defendant therefore is to rebut the presumption of discrimination *by producing evidence* that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient *if the defendant's evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this the defendant *must clearly set forth through the introduction of admissible evidence the reasons* for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. 248, 257, 101 S.Ct. 1089, 1095 (emphasis added).

As pointed out above, the trial court here held that the defendants had satisfied the requirement under *Burdine* merely by *contending* that the person believed to be most qualified was hired and because the defendants

denied that race affected the decision. The Court said: "Making that statement satisfied the defendants' light burden."

Appellees contend here that the trial court's standard of articulation is somehow supported by this Court's decision in *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138 (11th Cir.1983). In that case, we stated that after a prima facie case had been made by the plaintiff:

> . . . the defendants' burden of rebuttal is exceedingly light; 'the defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendants' evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.' [*Burdine*] [450 U.S.] at 254-55 [101 S.Ct. at 1094-95]. . . . At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate.

Based on this statement, appellees seem to be urging that in *Perryman*, we, in some way, lightened the burden of articulation as carefully mandated in *Burdine*. Of course, this is far from the truth. The statement that the burden was exceedingly light referred to the following part of the quotation which pointed out that there was no burden on the defendant to actually "prove" its reason. We did not mean, and of course we could not have meant, to hold that the burden of articulation was any less than that provided by the Supreme Court in *Burdine*. Therefore, the continued reference by the trial court to the "light," or "exceedingly light" burden on the defendants has no place in our consideration of this issue. The burden, of course, is precisely as stated in the above quotation from *Burdine*.

Appellees, by their brief here, attempt to support the trial court's statements by saying: "in other words, in order to satisfy this intermediate burden, the employer need only produce admissible evidence *which would allow* the trier of fact to rationally conclude that the employment decision was not racially motivated." Appellees' Br. p. 7 (emphasis added). In other words, appellees contend it is sufficient if they introduced evidence showing dissimilarities in two applicants' records so that the court could then decide which was better qualified.

It is clear, therefore, that the trial court adopted an incorrect standard by which to weigh the purported reasons given for the employment actions.

2. Furthermore, it is clear that the trial court erred in determining that in each of the more than 60 claims with which it dealt and as to which it assumed the establishment of a prima facie case, the defendants had satisfied the requirements of *Burdine*. In not a single case, did the defendants offer proof by any person who made the employment decision, or by any other person, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person. Moreover, the statement by the personnel director, Kassees, that it was the *general practice* of the department to select the best qualified, would not satisfy the requirements. He, of course, could not testify as to the basis of selection of the many selectees before he was employed in 1984. Moreover, each applicant is entitled to have his or her individual claim considered separately, not as one "in general." Moreover, the mere statement that the State selected the "best qualified" would be insufficient to

satisfy the *Burdine* requirements. Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of them. A mere statement that the employer hired the best qualified person leaves no opportunity for the employee to rebut the given reason as a pretext, which the employee must do if a proper reason is articulated.

The Supreme Court made perfectly clear in *Burdine* the reason for requiring the introduction of admissible evidence of the actual reason for the action taken. The Court stated:

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and *to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.*

450 U.S. at 255, 101 S.Ct. at 1094 (emphasis added). This, of course, means that the plaintiff must be given a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.

As pointed out above, the record does disclose that at least in some of the claims of some of the intervenors, the black applicant either had more seniority, more general education, or more experience on the particular job than the person who was given the position, but such claimant was not given the opportunity to rebut the claim of the State that the selectee was better "qualified" because no

witness testified to the particular qualification that was used by defendants.

This Court has expressly held that under *Burdine*, there must be "evidence that asserted reasons for discharge were actually relied on" or "the reasons are not sufficient to meet defendants' rebuttal burden." *Lee v. Russell County Board of Education*, 684 F.2d 769, 775 (11th Cir.1982), citing *Tanner v. McCall*, 625 F.2d 1183, 1195 n. 21 (5th Cir.1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981), *and see Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1429 (5th Cir.1984). There, the Court stated:

> Appellant next argues that the record is replete with non-discriminatory reasons for [its employment actions]. . . . The difficulty there, however, is that the defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged actions.

(Emphasis in original).

In this case, the defendants offered no evidence explaining any employment decision. The Court spoke in terms of the defendants' "claim" that all employees were selected on the basis of qualifications. Such a "claim," not supported by admissible evidence, did no more than allow defendants to furnish a resume from which the trial court then made *its* determination that the person selected was better qualified than the black applicant. Introducing personnel records which *may* have indicated that the employer based its decisions on one or more of the possible valid grounds did not suffice.

We must, therefore, remand the case to the district court for it to determine whether a prima facie case was made out by any of the claimants on any of their claims.[5]

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[5] We make this reference to the dissenting opinion. The opinion states as one of its essential parts that the case comes to us after a full trial. The opinion states:

> Because the case was fully tried a ritualistic *McDonnell Douglas* or *Burdine* analysis need not be pursued to uphold the district court's judgment on these disparate treatment claims. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1985).

The dissent fails to recognize that in the *Aikens* case, the Court spoke of it as a "fully tried" case only because the requirements set out in *Burdine* had been fully met. The Court stated:

> By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. *Texas Department of Community Affairs v. Burdine, supra,* [450 U.S.] at 254 [101 S.Ct. at 1094]. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255 [101 S.Ct. at 1094]. In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Id.* at 254 [101 S.Ct. at 1094].
>
> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by

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B. *The Expert Witness*

Appellants contend that the trial court erred in not accepting the opinion testimony of their expert, Dr.

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> offering evidence of the reason for the plaintiff's rejection the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case." 450 U.S. at 255, n. 10 [101 S.Ct. at 1094-1095, n. 10], and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 [101 S.Ct. at 1094]. After Aikens presented his evidence to the District Court in this case, *the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience.* See Tr. 311-313, 318-320, 325; App. to Pet. for Cert. 53a. The District Court was then in a position to decide the ultimate factual issue in the case. *Id.* 460 U.S. at 715, 103 S.Ct. at 1481 (emphasis added).

We also question the statement in the dissent: "As in any lawsuit, in employment discrimination cases defendants as well as plaintiffs may make their case with either circumstantial or direct evidence. *Cf. Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. at 1481 n. 3." There is nothing in *Aikens* that states that *defendants* may rely on circumstantial evidence in satisfying the requirement that they must articulate their reasons by admissible evidence. The cited note in *Aikens* states: "As in any lawsuit, the *plaintiff* may prove his case by direct or circumstantial evidence." (Emphasis added). It is difficult to understand how a claimed articulation by circumstantial evidence could meet the carefully stated requirements of *Burdine* that the reasons given are to be given "with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of defendant's evidence should be evaluated by the extent to which it fulfills these functions." 450

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Dyson. They contend that the trial court improperly rejected Dr. Dyson's testimony on the ground that he was not a statistician or economist. As we have stated above, if the court had accepted Dr. Dyson's testimony, there clearly would have been sufficient evidence from which the court could have found that the plaintiffs had made out a prima facie case. However, the decision by a trial court on the competency of, and what weight should be given to the testimony of, an expert is a highly discretionary one. *Ludlow Corporation v. Textile Rubber Chemical Co., Inc.*, 636 F.2d 1057, 1060 (5th Cir.1981). We are not prepared to find that the court's decision in this matter was an abuse of its discretion.

C. *The Class Action*

The record discloses much support for the appellants' contention that the trial court did not adequately require the defendants to respond to the interrogatories which they filed early in the litigation. The record discloses that the basis for the trial court's decertifying the class was the court's decision that the class lacked the financing necessary adequately to carry the action to a conclusion. However, that fact was in turn based upon an estimate of costs which the appellants stated could be obviated if the court required the defendants to furnish the additional information sought by appellants. Now

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U.S. at 255, 101 S.Ct. at 1094. We construe the Court's language to require evidence of a sort that will give a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.

that the trial court has had a full opportunity to observe the handling of the case, which, in effect, was still tried in many respects as if it were a class action, it will be in a position to give further consideration to its decision to deny recertification when moved for by the appellants. This issue will remain open for consideration by the trial court on remand.

D. *Employment Examinations*

On several occasions during the pendency of this action, appellants filed motions with the trial court, seeking to have the court require defendants to furnish information on the examination given to respective candidates for the positions at issue in this case and the scores of the several applicants. Shortly before trial, the trial court declined to require such information and held that the validity of the employment examinations, and the information concerning them, was not a proper part of this Title VII litigation. Defendants contended, and the court held, that plaintiffs' claims that the test was discriminatory were not a part of their EEO charge and investigation and that the plaintiffs therefore lacked standing to raise this issue.

This Court has held: "[T]he filing of a charge of discrimination with the EEOC is a condition precedent to the bringing of a civil action under Title VII." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir.1970). However, in *Sanchez*, we also stated: "[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." 431 F.2d at 465. We have also held that "[t]he

judicial complaint is limited to the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." *Griffin v. Carlin*, 755 F.2d 1516, 1522 (11th Cir.1985). We are convinced that it would be reasonable to investigate the employment examination issue based on the broad charges made by the plaintiffs.

Appellees also support their argument that the court correctly eliminated the examinations from consideration because they contend that the appellants lacked standing to sue. They base their contention largely upon their assertion that not a single one of the appellants had "failed" an exam, and that therefore they could not have been injured by the exam, no matter how discriminatory it may have been. Defendants overlook completely the fact that there was evidence to the effect that one of the elements considered by the selector for any of these positions was the relative test scores received by the applicants on the examinations. We conclude, therefore, that the plaintiffs had standing to raise this issue and the court erred in eliminating it from the case.[6]

E. *Breach of Plaintiff Holton's Conciliation Agreement*

Before becoming a party to this litigation, plaintiff Gracie Holton made a charge of discrimination. This charge resulted in a conciliation agreement between

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[6] In fact, one of the intervenors received a letter of rejection from defendants stating that one of the reasons for the rejection was that the other applicant had a higher test score on the examination.

Holton and the employer. Although she received the position she originally sought following the signing of the conciliation agreement, she claims that the agreement was breached in other respects. The trial court dismissed this claim at the conclusion of plaintiff's evidence because, as the court stated, the underlying discrimination problem had been resolved. The appellees contend that Holton has not exhausted her administrative remedies, but they overlook the fact that this Court has held that: "There is no need for the filing of timely charges with regard to the breach of a Title VII conciliation agreement. Such agreements can be enforced in federal court in the absence of any charges." *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1510 n. 8 (11th Cir.1985). In *Eatmon*, we stated that:

> The crucial factors of Title VII jurisdiction [in the federal court] over these types of cases is not EEOC participation. It is furtherance of the congressional goal of conciliation and voluntary compliance with Title VII. . . .
>
> Failure to permit these agreements to be enforced in federal court under Title VII could frustrate the congressional goal of compliance through conciliation.

Id. at 1512.

It is clear, therefore, that the trial court erred in dismissing the Holton claim for lack of jurisdiction.

V. CONCLUSION

The judgment of the trial court is therefore REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's opinion and judgment except for two points: I think (1) the district court's decertification of the plaintiff class was not an abuse of discretion; and (2) the district court's finding of no intentional discrimination – a finding of fact – is not clearly erroneous. I would affirm the judgment on these points.

"Questions concerning class certification are left to the sound discretion of the district court." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). Under some circumstances, decertification may be required where "it becomes apparent that [adequate] representation is not being afforded." *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir.1977). Such determination "is a question of fact that depends on each peculiar set of circumstances." *Id.* The district court held a hearing on decertification and found that counsel was no longer capable of adequately representing the class. After reviewing the record, I conclude that the decertification was not an abuse of discretion.

My second point, however, presents the chief reason that I write separately: to stress – in the light of Supreme Court precedent – the need to normalize the trials of employment discrimination cases. To me, the most important aspect of this case is that plaintiffs had the ultimate burden of persuading the trier of fact that defendants intentionally discriminated against plaintiffs. The second most important aspect is that the case comes to us after a

full trial, that is, the proceedings were not stopped by the grant of a motion.

Because the case was fully tried, a ritualistic *McDonnell Douglas* or *Burdine* analysis[1] need not be pursued to uphold the district court's judgment on these disparate treatment claims. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (after trial, courts must decide whether discrimination was proved; no need to make "inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof.' *Burdine*, 450 U.S. at 252, 101 S.Ct. at 1093"). "Where, as here, a disparate treatment case is fully tried, a Court should proceed directly to the ultimate question of intentional discrimination." *Moore v. Alabama State Univ.*, 864 F.2d 103, 105 (11th Cir.1989); *accord Powers v. Alabama Dep't of Educ.*, 854

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[1] "In *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), [the Supreme Court] set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reasons for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations and footnotes omitted).

F.2d 1285, 1290 (11th Cir.1988) (after trial, "court generally should not refer to the various 'stages of proof' "). "[T]he only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore v. Friday*, 478 U.S. 385, 398, 106 S.Ct. 3000, 3007, 92 L.Ed.2d 315 (1986).

The Supreme Court has consistently held that the *McDonnell Douglas* framework is not set in stone. *See Burdine*, 450 U.S. at 253-54 n. 6, 101 S.Ct. at 1093-94 n. 6; *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978) ("The method suggested in *McDonnell Douglas* for pursuing this inquiry . . . was never intended to be rigid, mechanized, or ritualistic."); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977) ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."); *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13.

A finding of intentional discrimination or of no intentional discrimination is a finding of fact. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). We should view the case as any other trial in which the district judge sits as factfinder and therefore apply the "clearly erroneous" standard. *Id.; Bazemore*, 478 U.S. at 398, 106 S.Ct. at 3007. Contrary to the implication of today's opinion, nothing in *Burdine* precludes disposal of a case under the clearly erroneous

standard after conclusion of a full trial on the merits. *Burdine,* 450 U.S. at 260 n. 12, 101 S.Ct. at 1097 n. 12.

After hearing the evidence and observing the parties in the courtroom, the trial judge made elaborate findings about *each* plaintiff's case. Adequate evidence supported the district judge's findings that plaintiffs failed to prove that they were rejected for or that someone else was preferred for promotion on account of race; the findings were not clearly erroneous.

Plaintiffs' case of disparate treatment consisted of testimony by each plaintiff that he or she had applied for an open position, had been facially qualified, had been rejected, and that a white employee had been chosen. Plaintiffs' evidence was extremely sketchy.[2] The district court found that "[p]laintiffs presented their case as if the burden was on the defendant to produce all of the information and all of the explanations merely upon the making of a general charge that discrimination existed." *Walker, et al. v. Firestone, etc.,* No. TCA 79-895-MMP, slip op. at 4 (N.D.Fla. Aug. 4, 1986). The district court elaborated:

> [M]ore often than not these plaintiffs could not identify who got the position, let alone whether they were truly better qualified. . . . In response, plaintiffs' counsel engaged in the

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[2] The district court noted that "roughly 61% of the specific claims in this case [were] based on hiring decisions made after this lawsuit was filed." Given the pendency of the lawsuit, the district court was "at a loss to understand the plaintiffs' general lack of information concerning what job was applied for, when, and who received it." *Walker, et al. v. Firestone, etc.,* No. TCA 79-895-MMP, slip op. at 4 (N.D.Fla. Aug. 4, 1986).

> highly irregular procedure of reading names and exhibit numbers into the record names and exhibit numbers into the record when plaintiffs' memories failed. . . . Time after time, even after engaging in this practice, plaintiffs failed to prove that the selectee in fact did not have higher qualifications and that the defendant used this reason as a pretext for engaging in discriminatory decisionmaking.

Id. at 8. The district court never determined whether plaintiffs made out a prima facie case.[3] Nevertheless, defendants pinpointed each challenged employment action (to the extent plaintiffs could identify them) and introduced much testimony and other evidence supporting the employment actions.

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[3] Defendant moved for involuntary dismissal at the end of plaintiffs' evidence, but the court never ruled on the motion. "[W]hen defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage the *McDonnell-Burdine* presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' " *Aikens*, 460 U.S. at 714-15, 103 S.Ct. at 1481-82 (citations omitted).

With respect to each claim the district court, "[a]ssuming without deciding that plaintiff made a prima facie case," concluded that "the evidence does not support plaintiff's claim." *Walker*, slip op. at 13. This conclusion should preclude the necessity of a remand for determination of whether plaintiffs had made out a prima facie case. The district court has no obligation to articulate in its opinion whether a prima facie case has been made out if, upon consideration of all the evidence, the trial court is convinced there was no intentional discrimination.

Defendants put on six days of testimony by supervisors of plaintiffs and by officials of the Florida Department of State. Defendants also introduced into evidence plaintiffs' personnel files, including work evaluations and job applications. Furthermore, defendants introduced into evidence the files of the successful applicants for each of the positions for which plaintiffs allegedly applied.[4] Through direct testimony, defense witnesses explained the contents of these files and traced the qualifications of each applicant.[5]

Considering defendants' evidence, no mystery cloaked defendants' position about why plaintiffs were not promoted. Thomas Gardner, the Assistant Secretary of State in charge of administrative matters since 1981, and several other supervisors testified that the practice of the Florida Department of State was to hire and to promote the most qualified applicants. Such testimony alone might be insufficient to meet defendants' burden of producing evidence of a legitimate nondiscriminatory reason

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[4] Plaintiffs, on hearsay grounds, objected to the introduction of job applications. The applications were admissible, if not for the truth of their contents, then as nonhearsay for what was represented to defendants about the applicants' qualifications. An employer might properly choose an applicant whose resume showed more experience than a rival's. That the information on the resume is ultimately false would not undermine the resume or application as evidence to support the legitimacy of an employment decision.

[5] The district court, however, limited the testimony by defense witnesses on the qualification or lack of qualification of plaintiffs for the particular position applied. The court sustained plaintiffs' objection to testimony where the defense witness had no personal knowledge of the circumstances under which the decision was made.

for the employment actions. Defendants went substantially further, however, by producing evidence of applicant qualifications.

Defendants introduced evidence of the successful applicants' qualifications and produced records and other testimony which cast clouds on the qualifications of plaintiffs. Defendants presented evidence of facts that bore on the decisions to reject plaintiffs for promotion: dismissal for physically striking a supervisor; failure to take a qualifying exam at the suggestion of the supervisor; a history of conditional and unsatisfactory evaluations by both black and white supervisors; a poor attendance record; rudeness to customers; excessive errors; disruptive and loud behavior; failure to listen to criticism; lack of motivation and initiative; attendance of an unaccredited college; and misrepresentation of educational qualifications on an employment application.

In addition to presenting evidence of the relative qualifications of the employees who were promoted compared to plaintiffs, defendants introduced evidence directly attacking plaintiffs' own proof. As part of the prima facie case, plaintiff must show that she was "in fact denied an *available* position." *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2378 n. 7, 105 L.Ed.2d 132 (1989) (emphasis in original). A number of the positions plaintiffs characterized as "job openings" were not in fact openings, but rather increases in grade of current employees created by the addition of new tasks to job descriptions. Some alleged "job openings" did not exist. Other "job openings" had been filled on an emergency basis by individuals who were groomed for the positions months before the job advertisements. For still others,

plaintiffs simply did not meet the minimum qualifications; or the successful candidate was a nonwhite or the decisionmaker was a nonwhite, belying the presumption of discriminatory animus. Moreover, it is not clear that plaintiffs ever submitted applications for a number of the positions allegedly denied them.

The record supports the trial court's judgment, but today's court avoids treating employment discrimination the same as any other factual question put to a judge as factfinder. Instead the court dictates, in an unprecedented way, how defendants in an employment discrimination action must present their case. The court says that the trial court committed reversible error because the trial court allowed defendants to rely heavily on circumstantial evidence to respond to plaintiffs' case based on circumstantial evidence.

Although this case was fully tried, plaintiffs and today's court invoke *Burdine's* order-of-presentation-of-proof language. Specifically, they contend that defendants failed to meet an obligation to present an issue of fact for trial because defendants did not call witnesses to say for each employment action, "I promoted ———, who I believed to be the most qualified person because . . . " But at least where, as here, plaintiffs' case is a circumstantial one, nothing in the law (including *Burdine*) demands such specific and direct evidence from defendants. As in any lawsuit, in employment discrimination cases defendants as well as plaintiffs may make their case with either circumstantial or direct evidence. *Cf. Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. at 1481 n. 3.

Plaintiffs' argument that defendants must produce pointed oral testimony[6] was rejected by this court in *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1141, 1144 (11th Cir.1983). In *Perryman*, we reversed and vacated a trial court finding that defendant "ha[d] not articulated any legitimate, non-discriminatory reasons for its actions" where the defense had "urged that [the decisionmaker's] decisions were based on objective factors such as prior experience, education, and job performance," and where the defense had introduced evidence of comparative qualifications. 698 F.2d at 1144. We held that defendant's proffer of comparative qualifications met its burden of production although the person who made the final decisions on hiring, promotion, and determination *never testified* about the actual reasons for the employment actions.

For a plaintiff to prevail in an employment discrimination case, she is not required to make a showing that she was in fact better qualified than the person chosen for the position. *Patterson*, 109 S.Ct. at 2379. Plaintiffs "are not limited to presenting evidence of a certain type" to establish pretext. *Id.* Likewise, defendants are not limited to presenting evidence of a certain type or forced to

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[6] To support the argument, plaintiffs and the court rely on *Lee v. Russell Board of Education*, 684 F.2d 769, 775 (11th Cir.1982), and *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir.1984). Neither decision is precedent for what the court does today. This case differs from *Lee* because in this case the reason advanced by defense witnesses (promotion of the best qualified) is the same as that credited by the trial court. Unlike *Uviedo* (an opinion not binding on us in any event), defendants have produced oral and documentary evidence to show their reasons for not promoting plaintiffs and did not merely rely on background testimony of plaintiffs' witnesses.

pursue a particular means to respond to plaintiff's circumstantial case.

The teaching of *Burdine*[7] and *Patterson*[8], and even more plainly of *Aikens*[9], is that employment

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[7] The Supreme Court in *Burdine* vacated a Fifth Circuit decision, *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563 (5th Cir.1979), that required a defendant, faced with a prima facie case, to "prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the discharge existed" and to "prove that those he hired . . . were somehow *better* qualified than was plaintiff." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095 (emphasis in original). The Supreme Court held that the Fifth Circuit misconstrued *McDonnell Douglas* and "exceed[ed] what properly can be demanded to satisfy a burden of production' when it placed on the defendant "the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." *Id.* at 257, 101 S.Ct. at 1095-96.

[8] The Supreme Court in *Patterson* reversed a Fourth Circuit decision affirming a verdict for the defendants where the judge erroneously "instructed the jury that in order to succeed petitioner was *required* to make [a] . . . showing that she was in fact better qualified than the person chosen for the position." 109 S.Ct. at 2378. The Court held that a plaintiff "may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." *Id.* at 2378-79.

As in other cases, the *Patterson* court held that "[t]he evidence which petitioner can present . . . may take a variety of forms." *Id.* at 2378; *see, e.g., Bazemore*, 478 U.S. at 400, 106 S.Ct. at 3009 (reversing and remanding for district court to consider, in a class action, circumstantial evidence of discrimination provided by a less than perfect salary regression analysis with the caveat that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence").

[9] In *Aikens*, the trial court required plaintiff to offer direct proof of discriminatory intent and to show, as part of his prima

(Continued on following page)

discrimination trials are normal trials and that the lower federal courts have been wrong to view these trials as arcane proceedings governed by rigid mechanized formulae imposing special burdens and constraints on the parties. Reviewed as we normally review nonjury cases after a full trial, the trial judge's findings on racial discrimination here would be affirmed because they could not be described as clearly erroneous. Still we reverse. With today's decision, the court continues its resistance to the normalization of employment discrimination trials. I regret that the court is continuing in this direction. Further development of arcane rules of trial procedure does nothing to eradicate employment discrimination, but does make the trial court's job more difficult and does lead to more "errors" in trials with the result being greater expenditures of time, energy, and money on retrials.

(Continued from previous page)

facie case, that he was "as qualified or more qualified" than the people who were promoted. The D.C. Circuit reversed and remanded with instructions for the district court to reconsider its earlier finding that plaintiff had not made out a prima facie case. *Aikens v. United States Postal Serv. Bd. of Governors*, 665 F.2d 1057 (D.C.Cir.1981). The Supreme Court reversed the D.C. Circuit, holding that the issue on remand after a full trial is not whether plaintiff made out a prima facie case, but whether "the defendant intentionally discriminated against the plaintiff." *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1482.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-3623 & 86-3727

D.C. Docket No. TCA 79-895-11

INCREASE MINORITY PARTICIPATION BY AFFIRMATIVE CHANGE TODAY OF NORTHWEST FLORIDA, INC., (IMPACT), on behalf of itself and its members, DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, CHARLES STEWART, BARBARA KING, DOROTHY ROBERTS,

Plaintiffs-Appellants,

JACQUELINE ROSS, LINDA ISAAC,

Intervenors-Appellants,

and

CLIFFORD SIMMONS, MARGUERITE STEWART,

Plaintiffs,

versus

GEORGE FIRESTONE, as Secretary of the State of Florida, STATE OF FLORIDA,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Florida

Before JOHNSON and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

EDMONDSON, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: February 6, 1990
For the Court:
Miguel J. Cortez, Clerk

By: Karleen McNoble
Deputy Clerk

ISSUED AS MANDATE: APR 11 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3623 & 86-3727

INCREASE MINORITY PARTICIPATION BY AFFIRMATIVE CHANGE TODAY OF NORTHWEST FLORIDA, INC. (IMPACT), on behalf of itself and its members, DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, CHARLES STEWART, BARBARA KING, DOROTHY ROBERTS,

Plaintiffs-Appellants,

JACQUELINE ROSS, LINDA, ISSAC,

Intervenors-Appellants,

and

CLIFFORD SIMMONS, MARGUERITE STEWART,

versus Plaintiffs,

GEORGE FIRESTONE, as Secretary of the State of Florida, STATE OF FLORIDA,

Defendants-Appellees.

FILED APR 2 1990

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(April 2, 1990)

(Opinion February 6, 1990, 11 Cir., 198___, ___ F.2d ___).

Before JOHNSON and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

ORD-42

* * *

11th Cir. R. 41-1 *Stay or Recall of Mandate.*

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing in banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DIANN WALKER, et al.,

Plaintiffs,

vs

GEORGE FIRESTONE, etc.,

Defendants.

CASE NO. TCA
79-895-MMP

FILED
1986 AUG 11

FINDINGS OF FACT &
CONCLUSION AT LAW &
FINAL JUDGMENT

This cause came on for trial between April 1, 1986, and April 15, 1986 in Tallahassee, Florida. The parties were granted leave to file written briefs in lieu of oral closing arguments no later than May 15, 1986. Having considered the evidence and arguments, the Court enters the following findings of fact and conclusions at law.

As in many cases involving allegations of racial discrimination, statistical evidence was a large part of this trial. Since this was not a class action and there was no validly asserted claim of disparate impact, the value (if any) of the statistical evidence lies in whether or not it lends credence to the claims by individual plaintiffs of disparate treatment. The first matter the Court must address concerning the plaintiffs' statistical evidence is the so-called Susans deposition. The Court finds that the information gathered and reported by Ms. Susans is not reliable. One-third of the EEO-6 categories were omitted

entirely, specifically the positions designated Word Processor Systems Operator I and II, Data Entry Operator, Cashier I and II, Fiscal Ass't Supervisor II, Fiscal Ass't I and II and Staff Ass't I. Other job classifications were counted by Ms. Susans but not included in the summary of charts. The time period of the applications covered in Ms. Susans' data is uncertain. The information gathering process utilized by Ms. Susans is so undeserving of the Court's confidence that no credence can be given to these documents as the basis for any conclusions.

As for plaintiffs' expert, Dr. Dyson, the Court finds as follows. Dr. Dyson was permitted to offer opinion testimony with a proviso by the Court that his qualifications would affect the weight given his testimony. Dr. Dyson was qualified to make the mathematical calculations he performed. However, Dr. Dyson is a political scientist, not a statistician or economist, and he testified about matters beyond his expertise. Dr. Dyson had no knowledge which could help the Court evaluate the available data. Even if Dr. Dyson had been testifying within his field of expertise, the Court would disagree with his choice of benchmarks. The use of a mathematical grand mean average of applicant flow data further distorted an already unreliable data base. The Court considers applicant flow data to be the preferred data base, but only when that information is accurate. The data from which plaintiffs operated was unfortunately too seriously flawed for validity. Aside from the matters discussed above, a large percentage of the applicants were of unknown race and Dr. Dyson did not perform any sort of validation to account for the unknowns. In addition, a job by job check of the data shows that the percent of black

applicants varies from 20-80% – further demonstrating that the use of a grand mean average as a benchmark distorts the results. Distortion was also caused by the counting of applications rather than applicants. On any given day one person might have been counted numerous times.

The more reliable benchmark in this case was the census data used by defendant's expert Dr. Joan Haworth. Although plaintiffs attempted to discredit Dr. Haworth's opinions, she was testifying within her area of expertise and gave better reasoned opinions based on the available data. Dr. Haworth's testimony concerning the serious flaws in plaintiffs' data were inadequately answered because plaintiffs lacked an expert capable of responding to Dr. Haworth in her field on her level. In this regard, the Court notes that the failure of plaintiffs' attorneys to procure more capable expert testimony is further evidence of the appropriateness of this Court's earlier decision to decertify the class because the class members' interests were not being adequately protected. The statistical evidence adduced by defendant's expert witness, which was not effectively refuted by plaintiffs, demonstrates no statistical disparity in hiring or promotions based on race.

Before turning to the individual claims by the individual plaintiffs a few general remarks on the evidence are appropriate. First, the evidence did not support plaintiffs' claim that the defendant deliberately withheld pertinent information. Plaintiffs claimed to have discovered vital evidence virtually on the eve of trial while taking a deposition of one of the defendant's witnesses. While it may be true that plaintiffs gained valuable information at

the last minute deposition, it does not follow that the information had been hidden until then by the defendant. This case was pending for seven years. Plaintiffs had more than reasonable opportunity to conduct discovery, take depositions and find out that information. No one is to blame except the plaintiffs themselves if they put off asking their questions until the eve of trial.

Roughly 61% of the specific claims in this case are based on hiring decisions made after this lawsuit was filed. In view of the fact that they actually had a pending lawsuit, this Court is at a loss to understand the plaintiffs' general lack of information concerning what job was applied for, when, and who received it. Only Mr. Charles Stewart, whose records were destroyed in a fire, has any excuse for this pervasive lack of preparedness. Plaintiffs presented their case as if the burden was on the defendant to produce all of the information and all of the explanations merely upon the making of a general charge that discrimination existed. The burden of proof, however, belongs to the plaintiff. This is so even when, as here, the primary means of proof are records of the defendant. The United States Supreme Court explained in *Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 258 (1981) that with the liberal discovery rules in Federal Courts and access to Equal Employment Opportunity Commission investigatory files it is quite fair to require plaintiff to shoulder the burden of proof.

In their written post-trial memoranda, plaintiffs continued to assert that the burden was on the defendant to prove both the comparative qualifications of the plaintiff and the person selected *and* that there was a legitimate nondiscriminatory reason for the hiring decision. Put

another way, plaintiffs attempt to place the burden on the defendant to prove that whoever was actually selected had higher qualifications than the rejected plaintiff. Yet the defendant need not prove that the successful applicant had higher qualifications, even when (as here) the justification offered for the decision is that the person thought to be most qualified was selected. *See McWilliams v Escambia County School Bd.*, 658 F.2d 326, 333 (5th Cir. 1981).

The initial burden is on the plaintiff to come forward with evidence establishing a prima facie case. The exact perameters of plaintiff's prima facie case will vary from case to case. *See McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 n. 13 (1973). In *McDonnell Douglas* the Supreme Court described the prima facie case as including evidence that:

1. Plaintiff belongs to a racial minority
2. Plaintiff applied for, and was qualified for, a job for which the employer was seeking applicants
3. Plaintiff was rejected despite being qualified, and
4. After plaintiff was rejected the position remained open and the employer continued to seek applicants with plaintiff's qualifications.

McDonnell Douglas Corp. v Green, 411 U.S. at 802. Yet in other cases the prima facie burden has been described more simply. *See McWilliams v Escambia County School Bd.*, 658 F.2d at 326 (*citing Simon v Honeywell, Inc.*, 642 F.2d 754, 755 n. 4 (5th Cir. 1981) (plaintiff can establish prima facie case with proof he is black, he applied and was

qualified for an available job, and was rejected in favor of a white.). Between these cases it is not clear whether it is part of plaintiff's burden in the initial proof to demonstrate the comparative qualifications of the person selected. Perhaps that is a factor that must vary from case to case.

Once plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the hiring decision made. In this case the defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance the defendant denies that race affected the decision. Making that statement satisfies the defendant's light burden. As the Supreme Court noted in *Texas Dept. of Community Affairs v Burdine*, 450 U.S. at 258, sometimes a defendant will also attempt to persuade the Court by producing evidence of the factual basis for its decision, but that is not required of the defendant. In this case the defendant did present testimony about why some of the actual selectees were better qualified. Regarding some of the contested positions the defendant supplied applications and personnel cards in support of its position that the person thought to be most highly qualified was hired. With regard to some other positions the defendant offered testimony to show why the plaintiff was considered less qualified. The Court finds that the defendant has more than sufficiently sustained its light burden of articulation with regard to each position.

Once a defendant articulates a legitimate nondiscriminatory reason the burden shifts back to the plaintiff to prove that the offered reason was merely a pretext

for discrimination and that the defendant was reall
motivated by improper racial considerations. At thi
point the plaintiff's burdens effectively merge. *See Clark*
Huntsville Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983)
Whether or not plaintiff was required to prove as part o
its prima facie case that the selectee had qualification
equal to or less than those of the plaintiff, it would b
virtually impossible for plaintiff to prove the defendant'
proffered explanation is unworthy of credence withou
some such evidence tending to show that the perso
selected was not more qualified. Unfortunately, mor
often than not these plaintiffs could not even identif
who got the position, let alone whether they were trul
better qualified. When plaintiffs' poor preparation an
paucity of pertinent evidence became apparent durin
trial, the Court warned plaintiffs it would not searc
through the exhibits after trial for indications who wa
hired and what their qualifications were if there had bee
no testimony at all about the person or which exhibi
contained the relevant information. In response, plain
tiffs' counsel engaged in the highly irregular procedure o
reading names and exhibit numbers into the record whe
plaintiffs' memories failed. Of course the defendan
objected to plaintiffs' counsel effectively testifying at th
trial. Time after time, even after engaging in this practice
plaintiffs failed to prove that the selectee in fact did no
have higher qualifications and that the defendant use
this reason as a pretext for engaging in discriminator
decisionmaking. The other way to rebut defendant's pro
fered explanation is to persuade the Court that a discrim
inatory reason more likely motivated the defendant. *Se*
Olafson v Dade County School Bd., 651 F.2d 393, 395 (5t

Cir. Unit B 1981). However, as was discussed above, the plaintiffs' statistical case was unpersuasive and the plaintiffs were not successful in establishing that racial motivations were the likely basis for the hiring and promotion decisions made by the defendant. The Court will now address the specific claims of the individual plaintiffs.

I. Plaintiff Diann Walker

Plaintiff Diann Walker applied in May 1978 for the position of Clerk V in the Division of Elections. Defendant alleges this claim is time barred. The successful applicant was a white female named Mary Anderson. Plaintiff offered no testimony of their relative qualifications except to say that Anderson had no supervisory experience, unlike the plaintiff herself. Diann Walker testified that she had never performed such normal supervisory functions as filling out evaluations and pay slips or deciding on disciplinary actions but she nonetheless had no doubt that she had supervisory experience at the time of this application. The Court finds that plaintiff did not in fact have supervisory experience. When plaintiff applied for this Clerk V position she was a Clerk-Typist III. At that time Mary Anderson held the more responsible position of Clerk IV. In fact, one month later plaintiff was promoted to the Clerk IV position vacated by Mary Anderson. Assuming, without deciding, that plaintiff's claim is not time-barred and that plaintiff has made out a prima facie case, the Court concludes that discrimination played no part in this job selection in that Mary Anderson was reasonably believed by the defendant to be the higher qualified candidate.

In February, 1979, plaintiff Walker applied for the position of Staff Ass't II in the Division of Corporations. A white male, Floyd Self, was hired. Plaintiff claims that Self was not qualified, that he was hired on an emergency basis without competition and was subsequently "waived in". Plaintiff alleges that the reason for this hiring decision was Self's political connections. Plaintiff did not allege race was a factor. Plaintiff asserts that she has stated a valid claim because, under Florida law, political connections are not a valid basis for a hiring decision. It is true that *Fla. Stat.* §110.105(2) states, in pertinent part, that all appointments, terms and conditions of employment in state government shall be made without regard to political affiliation. However, plaintiff has cited no authority under which she may state a Title VII (or §1981 or §1983) claim over the decision to hire a person with better political connections. Nor is this Court aware of any such authority, indeed, it appears the contrary is true. *See* 42 U.S.C. §2000e-2 (unlawful to discriminate because of race, color, religion, sex or national origin); *see also Ellis v United States Postal Service*, 784 F.2d 835 (7th Cir. 1986) (affirming dismissal of claims under Title VII, §1981 and §1983 for job discrimination based on lack of political connections); *Smith v City of Chicago*, 769 F.2d 408, 413 (7th Cir. 1985) (construing *Shakman* decision as expanding Title VII protection by "add[ing] speech and political affiliation to the list").

Furthermore, plaintiff has not demonstrated that Self was equally or less qualified by asserting that he was "waived in". Defendants introduced unrebutted testimony that persons who were "waived in" were not less qualified; rather, they were administratively determined

to have experience or other training equivalent to the minimum training and experience requirements. The application requesting a waiver for Mr. Self demonstrates his superior qualifications – a college degree (plaintiff had college coursework but no degree), course work toward a Masters degree and pertinent work experience. No actionable discrimination is evident.

In February 1979 plaintiff also applied for the position of Staff Ass't II in the Division of Elections. The person selected was Eleanor Ervin, a white female. Plaintiff claimed to be better qualified, testifying she had seniority over Ervin and that plaintiff should have received a preference since she was already employed in the Department and there was a policy to promote from within. Plaintiff's claims to be better qualified and have greater seniority than Eleanor Ervin approach the absurd. At the time of her application plaintiff was a Clerk IV. She was first employed by the State of Florida in December 1976 – 2 years and 3 months before filing this application for Staff Ass't II. Eleanor Ervin was first employed by the State of Florida in 1961, 18 years earlier, according to her application for the Staff Ass't II position (defendant's Exhibit 110). Ervin was continuously employed by the state throughout those 18 years, and from 1971-1979 she was already actually employed as a Staff Ass't II, albeit in the Governor's mansion rather than the Department of State. Plaintiff's claim that this hiring decision was the product of discrimination is patently unsupportable.

Diann Walker states that she applied in August 1979 for three Clerk V positions in the Division of Corporations. The persons allegedly selected were "Buck" Kohr, a white male, Kevin St. Louis, also a white male, and

Sandra Inks, a white female. William Kohr's personnel card (defendant's exhibit 122 (o)(1)) indicates a promotion in July 1979 from Data Console Operator to Data Console Operator Supervisor I, a reassignment in December 1979 to Clerk IV and a promotion to Clerk V in May 1980. Mr. Kohr's promotion to Clerk V came about as the result of the Clerk IV position he already held being reclassified (*see* defendant's Exhibit 122(o)(3)). More importantly, Kohr did not become a Clerk V until about nine months after plaintiff says he got the job for which she applied. As the record evidence is to the contrary, plaintiff's mere assertion that Kohr received a position for which she applied is insufficient to support a prima facie case.

Kevin St. Louis and Sandra Inks, on the other hand, were both promoted on July 27, 1979 to Clerk V in Corporations (*see* defendants Exhibits 107(a) and 263). Plaintiff contends these persons were unqualified and that they "leapfrogged" into the Clerk V position from that of Clerk II. To the contrary, St. Louis was a Clerk II in May 1978, was promoted to Clerk-Typist II, Data Console Operator and *then* Clerk V. Sandra Inks had been a Clerk II in September 1975. She was promoted to Data Console Operator and then (roughly one year later) to Clerk V. Plaintiff offered no other testimony or proof of their relative qualifications.

The Court finds that plaintiff was not discriminated against on the basis of race. Assuming, without deciding, that plaintiff made a prima facie case, the evidence does not support plaintiff's claim. Plaintiff was working in the Elections Division. St. Louis and Inks were both already working in the Corporations Division and familiar with

the work there. St. Louis had a college degree, unlike plaintiff. Inks had over a year more seniority than plaintiff. Finally, plaintiff was in fact promoted to Clerk V in the Elections Division (where she had her experience) a mere month later.

In May, 1980, plaintiff Diann Walker testified she applied for a Secretary IV position in the Division of Archives and an unknown white female was hired. It is extremely doubtful whether such an assertion can be sufficient to satisfy plaintiff's *prima facie* burden to prove that a white person was hired. Nonetheless, the defendant came forward with testimony that a white woman named Jean McElveen received a Secretary IV position in Archives at that time, when her Secretary III position was reclassified. The defendant supplied copies of Miss McElveen's personnel card and application (defendant's exhibits 197(a) and 197(b)). Unfortunately, these documents do not support the defendant's contention that the recipient of this position was McElveen. Jean McElveen was a Secretary III in Archives and her position was reclassified to Secretary IV, but in October, 1979.

Plaintiff contends in her post-trial memorandum that N. Revell got the Secretary IV position for which plaintiff applied in May, 1980. Plaintiff states that she should prevail on this claim because the defendant failed to introduce evidence of Revell's superior qualifications. Plaintiff's reasoning is off the mark. The burden never shifted to the defendant to supply any reason for selecting Revell over Walker becuase [sic] plaintiff never came forward with evidence that Revell was the selectee. Even if this contention that N. Revell was hired had been timely made and supported by evidence, it would not

have been the defendant's duty to prove the selectee had higher qualifications. The plaintiff has the burden of demonstrating that the selectee was not the more qualified candidate or offering some other evidence that the offered explanation was really a pretext for discrimination. The plaintiff has not done so.

At trial plaintiff Walker testified she applied in June 1980 for an Executive Secretary I position in the Division of Archives and that an unknown white female was hired. Neither plaintiff or [sic] defendant refers to this position in their post-trial memoranda. This allegation standing alone is clearly insufficient and the Court considers this claim to have been abandoned, *see McWilliams v Escambia County School Bd.*, 658 F.2d at 336 (in factually and legally complex discrimination case parties have duty to insure court's cognizance of their claims).

Plaintiff Walker testified she applied in May 1980 (and received a letter of rejection in September of that year) for a position as Secretary IV in the Office of the Secretary of State, and that an unknown white female from the office of the Attorney General was hired. The interviews were conducted by Bill Stevens, a black male. Plaintiff testified that she herself was qualified and that she knew nothing of the qualifications of the person selected. This was one of those occasions, remarked upon earlier, when plaintiff's counsel testified, in effect. Counsel read into the record, referring to plaintiff's exhibit Z33, that T. Dusseault received this position. If plaintiff's exhibit Z33 contains any information concerning the qualifications of T. Dusseault or anyone else it is not apparent to the Court. In the written post-trial memorandum, plaintiff once again erroneously asserts that she

should prevail on this claim because of defendant's failure to offer testimony on the qualifications of the selectee. Plaintiff has failed to sustain her burden of establishing that the selectee had qualifications equal to or less than those of the plaintiff or some other evidence that it was merely a pretext when the defendant claimed to have hired the person thought most qualified.

The next position plaintiff Diann Walker asserts she was discriminatorily denied is that of Administrative Ass't II in the Division of Elections, for which plaintiff says she applied in August 1982. Plaintiff avers that the successful applicant for this job was a white female named Trannie Fewell. Plaintiff testified that Trannie Fewell lacked the requisite experience, particularly supervisory experience. The Court has already indicated that plaintiff's own claims of supervisory experience are unfounded. Fewell had a college degree, two years experience as a teacher and was with the Department of State years longer than Walker in progressively responsible positions. Plaintiff has not substantiated a claim to having equal or better qualifications than Fewell. Defendant relies on Fewell's greater seniority and college degree as justification for selecting Fewell over Walker. The Court finds that this decision was not motivated by discriminatory intent.

The facts concerning the final position for which plaintiff Walker makes a claim are somewhat confused. At trial, plaintiff testified she applied on an unknown date for an Executive Secretary II position, that Diane Recupero (a white female) was hired, and that plaintiff had more seniority and equal or better qualifications. Plaintiff's post-trial memorandum omits any mention of

this position. The defendant's memorandum contains a reference to an Executive Secretary I position applied for in late '82.

Diane Recupero nee' Roland in fact had more seniority than plaintiff, having first been employed by the Department of State in the Division of Archives as a Secretary III in February, 1976. In comparison, plaintiff was hired as a Clerk III in December, 1976. In July, 1979, Recupero's Secretary IV position was reclassified as an Executive Secretary I. At that time, Recupero had more secretarial experience, more seniority and was already performing some, if not all, of the Executive Secretary duties. Recupero never became an Executive Secretary II, her next promotion was to Staff Ass't II and then Accountant I. If plaintiff was ever denied an Executive Secretary job which was received by Diane Recupero, Recupero was then better qualified to fill the position and there was no discrimination.

II. Plaintiff Charles Stewart

Plaintiff Charles Stewart first asserts that he was discriminatorily denied the position of Bureau Chief of Administrative Code in July 1977. Stewart states that he met the qualifications requirement of a four year degree and three years administrative experience. Plaintiff stated further that the successful applicant was Lizzie Cloud, a white female who did not have either a four year degree or three years administrative experience. The defendant contends that this claim is time barred, an issue plaintiff does not address.

Assuming, without deciding, that plaintiff's first claim is not time barred, it is nonetheless clear that plaintiff has no basis for recovery with regard to this position. Plaintiff did have a four year degree and the fact that the school was not accredited will not be held against him since the Department of Administration accepted degrees from plaintiff's alma mater as if the school was accredited. Nor did Lizzie Cloud have a college degree, although the minimum training and experience requirements did make provision for substituting experience for college time on a year for year basis. Plaintiff's claims to several years of administrative experience are less secure. It developed at trial that some of the experience claimed by plaintiff was less responsible than he attempted to make it sound, and that in some of the years listed he actually only worked part of the Spring and Summer. Lizzie Cloud, on the other hand, had been continuously employed at the Department of State since 1966. Her responsibilities, capabilities, and the quality of her work were well known. According to her application for Chief of Administrative Code (defendant's exhibit 140) she had been performing most, if not all, the duties of that position since 1972 while classified a Clerk IV. One of Cloud's performance evaluations from 1975, while she was still a Clerk IV, contains the following statement: "Due to the workload and type work Liz does, her position should certainly be upgraded to something in a much higher classification bracket." That evaluation, defendant's exhibit 139(e), is signed by Dorothy Glisson as both Division Director and Evaluating Supervisor. The Court finds that the decision to hire Liz Cloud rather than Charles Stewart was not a product of discrimination.

Plaintiff Stewart next asserts he was discriminatorily denied the position of Bureau Chief of Election Records in early 1979 and that the job went to a white male named Rodney Bevis. In comparing their qualifications, plaintiff avers that Bevis lacked the requisite four year degree. The job description for Chief of Election Records (defendant's exhibit 53(kk) states that the minimum training and experience is three years administrative or managerial experience and graduation from an accredited four year college, with the proviso that experience might be substituted on a year by year basis for college training. According to Bevis' resume (defendants Exhibit 69(g)) he had a two year Associate of Science Degree and some additional college-level coursework of about one year. Mr. Bevis also had at least six years of managerial experience in his positions as Assistant Manager of Bevis Funeral Home, Campaign Treasurer/ Bevis for Congress Campaign and as part owner and manager of the Corner Store. Bevis had some college, if not a four year degree, and a great deal more qualifying experience than plaintiff. No discrimination has been demonstrated in connection with this hire.

Plaintiff Stewart made a claim with regard to a Regional Representative position applied for in July 1979, but stated he did not know who, if anyone, received the job. Plaintiff's counsel testified, in effect, that he was satisfied that the recipient of the position was Carl Wall. Once again, without commenting on the propriety of this method of proof, plaintiff has still failed to sustain his burden of establishing that there was discrimination. There has been no proof of Carl Wall's race or qualifications, and therefore plaintiff cannot prevail since it was his responsibility to come forward with such evidence.

The last job for which plaintiff asserts a claim is the position of Office Operations Supervisor I, filled in October 1979. The minimum training and experience was a four year degree with a major in business or public administration and four years of administrative/management experience, provided that additional experience could be substituted for the college training (see defendant's exhibit 53z).

Plaintiff asserts he was better qualified than Ira Chester, who received the job, because Chester had only two years of college. However, in addition to his college training, Chester had over 20 years of qualifying experience. Assuming, without deciding, that plaintiff met his burden to establish a prima facie case, defendant has presented a legitimate nondiscriminatory basis for the decision. Plaintiff has not proven that this was a pretext. The Court finds that there was no discrimination involved in the selection.

III. Plaintiff Dorothy Roberts

Plaintiff Dorothy Roberts applied in February 1979 for an Accountant III position in the Division of Administrative Services. The successful applicant was Daniel Corcoran, a white male. Plaintiff testified that the minimum training and experience requirements for this job called for two years professional accounting experience. Plaintiff Roberts compared her qualifications to those of Corcoran, stating that she was the better qualified candidate. Plaintiff Dorothy Roberts testified that she had 2 1/2 years

professional accounting experience and six years supervisory experience. On the other hand, according to plaintiff, Daniel Corcoran was five months shy of the minimum two years professional experience requirement. Defendant in turn offered a legitimate reason for this hiring decision, to-wit: Corcoran was better suited due to his actual experience with the SAMAS system. Plaintiff did not attempt to prove that the offered reason was a pretext for discrimination and the Court finds that it was not. Finding no racially discriminatory motive the Court finds that Dorothy Roberts is not entitled to recover on this claim. Accordingly, plaintiff Roberts' second claim must also fail. The second claim is based on plaintiff's belief that if Ms. Roberts had received the Accountant III position discussed above she might also have gotten the promotion received by Corcoran when the position was upgraded to Accountant IV.

IV Plaintiff Barbara King

The most egregious example of the woefully inadequate presentation of evidence by plaintiffs can be found in the case of Barbara King. At trial plaintiff King testified that she was discriminatorily rejected after applying for fifteen specifically identified positions. Of those fifteen jobs, plaintiff stated, one was received by Patty Stewart, one was received by a woman named Nancy and the remainder went to persons unknown. One of those unknown persons was definitely black, according to plaintiff, and as to some of the others plaintiff had no knowledge of the race of the selectee. At the very least such claims border upon frivolousness, depending as

they do upon plaintiff's vague and unsupported subjective belief that she was a victim of wrong doing. The defendant should never have been forced to defend against such amorphous charges. Perhaps plaintiff implicitly recognized this when she omitted any reference in her post-trial memorandum to over a third of the claims which she'd raised at trial.

The first position about which plaintiff asserted a claim at trial is Clerk-Typist III. Plaintiff states she applied for this position in February 1979. The successful applicant is unknown. The Court notes that Ms. King was promoted to Clerk-Typist III in September 1979. Having failed to establish a prima facie case, the Court finds plaintiff has no valid claim of discrimination in connection with this position.

In March 1979 plaintiff King avers she applied for a Secretary III position. Plaintiff testified she satisfied the minimum training and experience requirements, that Patty Stewart was hired and that plaintiff had no knowledge of Ms. Stewart's qualifications. The evidence supports plaintiff's testimony, at least in part, indicating that Patricia Stewart did in fact receive a Secretary III position in February or March of 1979. It is somewhat ironic, since this is the only selectee of whose name plaintiff was sure, that plaintiff's post-trial memorandum does not list Patty Stewart as the successful applicant for any contested position. In addition to the uncertainty which exists over whether plaintiff even applied for and was denied the position received by Patricia Stewart, plaintiff failed to produce any evidence of their comparative qualifications or any other evidence that it was a pretext for discrimination when the defendant claimed to have hired the person

thought to be most qualified. Plaintiff has failed to carry the burden of proof in connection with this claim.

At trial plaintiff testified she applied for three Secretary III positions in April 1979: one in Cultural Affairs, one in the General Counsel's office and one in Archives. Plaintiff testified that the job in the General Counsel's office went to "Nancy", the other persons who were selected were not known to plaintiff. Once again plaintiff's counsel engaged in the questionable practice of testifying that plaintiff's exhibit Z33 indicates who received these jobs and proceeding to name them. According to plaintiff's post-trial memorandum two Secretary III positions, not three, were at issue in April 1979. The two successful applicants were apparently J. Munley and C. Dunn, since each is listed in the memo as the selectee for both positions. Obviously, neither of the persons named in the post-trial memorandum as a recipient of one of these positions is named Nancy. Thus plaintiff's scant recollection and her attorney's testimony do not support one another, detracting from the credibility of each. As to all of these (two or three) Secretary III positions, plaintiff failed utterly to make any meaningful comparison of her qualifications and those of the selectees, failing to rebut the defendant's assertion that the best qualified person was selected in each instance. Plaintiff offered no evidence of the selectee's qualifications, no testimony, no applications and no personnel cards. The defendant submitted the personnel cards of Cynthia Dunn (defendant's Exhibit 312) and Janus Munley (defendant's Exhibit 313) in support of its position that the most qualified persons were selected, despite the fact that the defendant was not required to

submit such proof. In Munley's case her application was also attached to the exhibit. It indicates that she had been awarded a Master's Degree in Historical Administration from Florida State University. Plaintiff offered no evidence that this was not relevant to the position of Secretary III in the Division of Archives. Dunn was hired a little over a year earlier than plaintiff and therefore had seniority in her favor. Dunn had progressed from Clerk-Typist II (the same starting position as plaintiff) to Data Console Operator and then EDP Control Clerk before being promoted to Secretary III. Plaintiff was still a Clerk-Typist II in April 1979. As stated earlier, plaintiff did not rebut defendant's justifications for the decision that these other candidates were better qualified than plaintiff.

Plaintiff testified that she applied in March 1980 for a Secretary III position in the Office of the Secretary of State and again in April 1980 for Secretary IiI in the same office as well as a Secretary III position in the Division of Archives, also in April 1980. The name and race of the selectee for the position for which plaintiff applied in March were unknown to plaintiff. As to each of the April applications, plaintiff testified that an unknown white person was selected. All three of these positions are unmentioned in plaintiff's post-trial memorandum and the Court considers these claims abandoned. If not abandoned, plaintiff's proof was clearly insifficient [sic] to sustain her claims.

Plaintiff King testified that she applied in May 1980 for a Word Processor Systems Operator I position and that an unknown white person was selected. Plaintiff's post-trial memo lists two persons as the selectee for this position, without any explanation ever being offered for

identifying these two people as the recipient of one job. The two persons named are L. Bishop and C. Merritt. Once again, plaintiff offered no evidence at all concerning the selectee's qualifications, failing to rebut the defendant's claim to have hired the best qualified candidate in each instance. Once again, defendant stepped forward with evidence in the form of the personnel cards and applications of the persons identified as selectees (see defendant's Exhibits 309 and 310). Even after the defendant produced this evidence, the plaintiff failed to provide any evidence or testimony that might establish that the defendant's offered reason for the hiring decision was a pretext, in view of the selectee's and plaintiff's comparative qualifications or otherwise. Plaintiff, having failed to sustain the burden of proof, cannot prevail.

The next position for which plaintiff asserted a claim at trial was that of Clerk V. Plaintiff testified that she applied in June 1980 and that an unknown white person was hired. Plaintiff makes no reference to this claim in her post-trial memorandum. The Court agrees that it warrants no further discussion.

Plaintiff testified that she applied for two Secretary IV positions, one in June 1980 and again in August 1980. In each instance, plaintiff testified, she satisfied the minimum training and experience requirements and that an unknown white person (with unknown qualifications) was selected. Plaintiff's post-trial memorandum contains a reference to only one Secretary IV position, as to which plaintiff purportedly received a rejection letter in late November 1980. It is not possible to discern which, if either, of the two Secretary IV positions about which plaintiff testified is the position which plaintiff's memo

states was awarded to L. Price. Defendant offered into evidence the personnel card and application of Lucy Price (defendant's Exhibit 311). Miss Price had a Bachelor of Science Degree and a wealth of secretarial experience. When Lucy Price applied for the Secretary IV position, she was employed in the Department of Legal Affairs as a Secretary III. Plaintiff offered no testimony comparing her experience as a Clerk-Typist III to that of a Secretary III. In fact, plaintiff offered no evidence to rebut the defendant's contention that the person thought to be most qualified was hired without regard to race.

V. Plaintiff Pearl Williams.

Plaintiff Pearl Williams testified she applied in February 1979 for a Clerk-Typist III position in the Division of Corporations. Plaintiff stated that after the position had been advertised she was told that it was being deleted without having been filled. Plaintiff was offered a promotion to Magnetic Media Operator at this time. She accepted the promotion, but then turned around and turned it down when she learned the Clerk-Typist III position was being readvertised. Plaintiff implied that the promotion she had been offered was not as good as being a Clerk-Typist III and that discrimination was the motivation behind telling her the Clerk-Typist III position was deleted and then readvertising it. Plaintiff stopped short of suggesting that the promotion to Magnetic Media Operator was offered to her for discriminatory reasons. Plaintiff testified that she could not recall whether she reapplied for this Clerk-Typist III position when it was readvertised. Thus it is not at all clear that plaintiff even made a prima facie case with regard to this position, since

it is necessary to prove one applied for an available position.

Assuming, without deciding, that plaintiff did make out a prima facie case, the Court will review the rest of the evidence. The recipient of the Clark-Typist III [sic] position was a white female, Mary Haygood. Plaintiff did submit her own and Haygood's personnel cards (see plaintiff's exhibit S10-A) but offered no other evidence or testimony on their comparative qualifications. The personnel cards do nothing to rebut defendant's contention that the person thought to be most qualified was hired. Haygood had seniority over Williams. Disregarding her years of OPS work, Haygood was first hired by the State of Florida in a Career Service capacity in October 1975. Pearlie Williams was first hired in June 1978. Haygood was promoted from Clerk-Typist II to Data Console Operator about seven months before she received the contested Clerk-Typist III position; plaintiff was still a Clerk-Typist II at the time. The fact that plaintiff had been promoted in December 1978 to Clerk-Typist III and demoted one month later back to Clerk-Typist II due to a reorganization does not make plaintiff's qualifications equal to those of Haygood who was actually performing a higher position than Clerk-Typist II for seven months. Nor did plaintiff have any entitlement to be promoted to Clerk-Typist III at the earliest opportunity without regard to the comparative qualifications of the other applicants. Plaintiff was still a probationary employee when she was demoted. The Court finds that the defendant has articulated a legitimate reason for this hiring decision and that plaintiff has not proven that the offered reason was really a pretext for discrimination.

The next position about which Pearlie Williams complains is that of Clerk IV, for which plaintiff applied in March 1980. Plaintiff testified that a white male, Henry Allen, was hired. Although plaintiff did point out that Mr. Allen was a white male, she never contended that race was a motivating factor. The only suggestion offered by plaintiff as to why Allen was wrongfully selected instead of her was that he was the son of a State Representative. On cross-examination plaintiff testified that after Allen got the job the duties were changed to include involvement with political committees. Plaintiff offered no evidence whatsoever that the political responsibilities were not contemplated when the selection decision was made. More importantly, plaintiff has not made a claim of racially-motivated discrimination. To the extent political connections played any part in this selection, that is not actionable (see discussion above concerning plaintiff Walker's claim that Floyd Self was hired as Staff Ass't II in February 1979 because of his political connections). Even if plaintiff also meant to assert that race played an improper role in this hiring decision she would not prevail. Plaintiff testified she knew nothing of Allen's qualifications. No evidence has been offered to rebut defendant's explanation that the person thought to be most qualified was hired without regard to race.

In April, 1982, plaintiff Williams alleges she applied for a Secretary IV position and was not promoted. According to plaintiff's own testimony she was not qualified for this position, having failed and not retaken the required test. Plaintiff offered no testimony who, if anyone, received this position or what that person's race

might have been. Plaintiff has failed to state a claim for discrimination with regard to this position.

Also in 1982, although the exact month is unknown, plaintiff applied for another Secretary IV position. Apparently this is a different Secretary IV position because plaintiff testified the written test was no longer required. Plaintiff stated that this position went to Susan Lincicome, a white female. Once again, the only evidence plaintiff offered in rebuttal of defendant's contention that the person believed to be most qualified was hired were the personnel cards of the selectee and herself. While these cards do indicate that plaintiff had seniority over Miss Lincicome, that is all they tell. Miss Lincicome's application was not offered into evidence by plaintiff. The defendant did supply this application in support of its decision (defendants Exhibit 268(2)) and based on the information contained therein the Court cannot say that plaintiff was more qualified or that any inference of discriminatory motive arises from the selection of Lincicome instead of Williams. Plaintiff had a High School Diploma and some vocational school typing courses. Lincicome was better educated, holding an Associate of Arts Degree. Both candidates held the position of Secretary III when they applied. On paper their qualifications are similar enough that perhaps plaintiff might have sustained her burden of establishing discriminatory intent if she had supplied anecdotal evidence or statistical support. But plaintiff has the burden of proof and persuasion and any doubts about the actual qualifications of the two candidates must be resolved against plaintiff. *See McWilliams v Escambia County School Bd.*, 658 F.2d at 333. Plaintiff has not produced any evidence tending to show that the

defendant hired someone other than the person honestly believed to be most qualified and so her claim must fall.

Next plaintiff Williams testified that she was discriminatorily denied three Administrative Secretary positions in 1984-85. The three white females whom plaintiff contends received these positions are Barbara Birks, Elinor Kalfas and Nancy Downing. Plaintiff testified that she met the minimum training and experience requirements but offered no testimony concerning the successful applicants' qualifications. However, plaintiff did offer into evidence (plaintiffs' exhibit S10-A) their personnel cards. Nancy Downing transferred to the Department of State Division of Elections in August 1985 into a Senior Secretary position. In January 1986 her personnel card lists her job title as Administrative Secretary, but no new position number is listed so it would seem to be a renaming of the same job. There is no information about Mrs. Downing's previous experience or seniority in the Career Service. Plaintiff cannot rebut defendant's claim to have hired the person thought to be most qualified with such scant evidence. Barbara Birks' personnel card indicates she was employed in 1982 as a Secretary IV, reassigned in January 1983 to Library Tech. Ass't I and then was reassigned in February 1983 back to the Secretary IV position she'd held earlier. Miss Birks resigned from the Department of State in November 1983. Thus, above and beyond the dearth of information about qualifications, previous experience and seniorty [sic], plaintiff's exhibit does not support her testimony that Birks received a position which plaintiff was denied in 1984-85. Elinor Kalfas apparently replaced Barbara Birks; she was hired into a Secretary IV position (with the same position number) in

January 1984. Assuming that this is the position to which plaintiff referred when she testified that Elinor Kalfas received an Administrative Secretary position for which plaintiff applied, plaintiff has once again failed to sustain her burden of proof. Plaintiff supplied no evidence concerning their comparative qualifications, or any other evidence, tending to show that it was a pretext for discrimination when the defendant stated that the person believed to be most qualified was hired. The same problem would defeat plaintiff if she'd meant to contest Mrs. Kalfas' promotion in July 1985 to Administrative Ass't II.

Also in 1985, plaintiff contends, she was discriminatorily denied a Secretary IV position which went to a white female named Laverne Barrett, and a Sr. Clerk position which was awarded to Miguel Hernandez. As to each of these positions, plaintiff offered no evidence other than the personnel cards of the successful applicants. The Sr. Clerk position is not even mentioned in plaintiff's post-trial memorandum. Mr. Hernandez was hired as a Clerk V; plaintiff has offered no evidence about his prior qualifications. In January 1986 Mr. Hernandez' position was apparently retitled Sr. Clerk, since no promotion, demotion, reclassification or new position number is indicated on his personnel card (plaintiff's Exhibit S10-A). Beyond the fatal failure to adduce any pertinent evidence to rebut defendant's statement that the person thought to be most qualified was hired, plaintiff appears to contest Mr. Hernandez' selection for a Sr. Clerk position he effectively already held, for which Mr. Hernandez would presumably be the best candidate, if indeed this Sr. Clerk position was ever even available to

others. Plaintiff's tacit abandonment of this claim is, perhaps, an acknowledgment of the truth of all these conclusions. As for Laverne Barrett, her personnel card (plaintiff's exhibit S10-A) indicates that she was hired as a Sr. Secretary and that in January 1986 her position was retitled 'Administrative Secretary'. Mrs. Barrett was never in a position officially titled Secretary IV. If there was competition for the Administrative Secretary position when it was retitled and if this is the position plaintiff really meant, the only evidence offered by plaintiff is that Mrs. Barrett already held the position and might well therefore have been the logical choice. If plaintiff meant to contest Mrs. Barrett's initial hire as a Sr. Secretary her claim must fall for her failure to produce any pertinent evidence to rebut defendant's statement that the person thought to be most qualified was hired. The Court notes that the defendant has supplied Laverne Barrett's application (defendants exhibit 267(2)) in support of its position. Mrs. Barrett had been employed at Florida State University as a Secretary Specialist since 1981, handling a variety of types of work using numerous secretarial skills. Plaintiff has not sustained her burden of proof.

VI. Plaintiff Louvenia Jones

Plaintiff Louvenia Jones claims she was discriminatorily denied a position as a Clerk II in the Division of Library Services for which she applied in January, 1977. Plaintiff never testified who got the job or what their qualifications or race were. Plaintiff's counsel states that plaintiff's exhibit Z33 indicates Ann Surrency, a white female, received this position. Plaintiff has provided no evidence to rebut defendant's contention that the person

thought to be most qualified was hired, no testimony, applications or even personnel cards pertaining to Ann Surrency were produced by plaintiff Jones.

The next position as to which plaintiff asserted a claim was a Clerk II job in the Corporations Division. Plaintiff stated she was rejected in a letter dated April 1977. Plaintiff Louvenia Jones offered no testimony herself regarding who received this position, what their race was or what qualifications they had. Plaintiff's counsel read into the record from plaintiff's exhibit Z33 that two white persons were hired as Clerk II in Corporations in March and April, 1977, named D. Koon and T. Brown. Once again plaintiff failed to refute the defendant's claim to have hired the person thought to be most qualified.

Plaintiff leveled a very broad charge that she was discriminatorily rejected for about a dozen Clerk I and Clerk II jobs before she was initially hired in April 1977. Plaintiff was no more specific about these positions. If plaintiff attempted to state a claim over those denials, she failed. Aside from the possibility some of those claims might be time-barred, plaintiff's assertions were too vague.

In July 1977 plaintiff sought a promotion to Clerk III in the Division of Elections. Once more, plaintiff offered no testimony about who the recipient of the job was or what that person's race was. Plaintiff's counsel informed the Court that, according to plaintiff's exhibit Z33, Pat Bridgham was hired. Still no testimony or evidence was produced by plaintiff concerning Bridgham's qualifications. Plaintiff failed to sustain her burden of proof.

Plaintiff Jones testified that in September 1978 she tried to apply for a position as a Book-keeping [sic] Machine Operator (also known as Account Clerk II). Plaintiff testified that this position went to a white male named David McCullars. Plaintiff explained that she never actually applied because she was told she had to pass a certain written test before being allowed to file an application. Plaintiff Jones took the test but she says a woman in personnel named Kathy Turner (who was McCullar's girlfriend or finaceé) lied and told plaintiff she had failed the test. It is not certain that these facts are sufficient to state a claim for discrimination based on race. First, plaintiff never actually applied for the position. One may, however, have a claim without applying, if one was discouraged because of race from filing an application. *International Brotherhood of Teamsters v United States*, 431 U.S. 324, 368 (1977). But the second problem with plaintiff's prima facie case arises out of the test set out in *Teamsters*. Plaintiff must prove that she was discouraged from applying by the defendant's racially discriminatory practices. Plaintiff has not alleged that racial discrimination had anything to do with preventing her from applying. According to plaintiff's own testimony, Turner's only motive for preventing plaintiff's application was the fact that the successful applicant to be was Turner's boyfriend.

Also going to the existence of a prima facie case, the defendant disputes whether plaintiff tried to apply for this very position. The defendant produced testimony that McCullars got a job called Account Clerk II, not Book-keeping [sic] Machine Operator. Jay Kassees, Personnel Director, testified for the defendant that there

were no Book-keeping [sic] Machine Operator vacancies in 1978 and the only such vacancy occurring in 1979 was filled by Joyce Houston, a black female. Plaintiff stated that the job titles Account Clerk II and Book-keeping Machine Operator were interchangeable. Plaintiff's position is apparently correct since Houston filled the position vacated by McCullars. The position number remained the same and only the title changed. In sum, it would appear plaintiff sought to apply for the position McCullars received but it is not established that the reason plaintiff did not apply was the defendant's racially discriminatory practices.

Assuming, without deciding, that plaintiff did establish a prima facie case, she did not sustain her overall burden of proof. Plaintiff introduced no evidence of their comparative qualifications except McCullars' personnel card (plaintiff's exhibit S10-A). It is true that McCullars moved up from Mail Clerk I to Account Clerk II. It is also true though that McCullars had almost two years seniority over plaintiff as a Career Service employee. Without more information about education and job skills and previous experience, plaintiff cannot be said to have sustained her burden of establishing that the person truly thought most highly qualified was not hired because of race.

Plaintiff testified that she applied for two Staff Ass't I positions, one in August 1981 and the other in July 1982. No testimony whatsoever was introduced by plaintiff concerning who received these positions or what the race of each recipient was. Both these claims are omitted from plaintiff's post-trial memorandum. The Court considers these claims abandoned. Alternatively, if not abandoned, plaintiff failed completely to sustain her burden of proof.

The final position regarding which plaintiff Louvenia Jones asserts a claim is that of Records Mgmt. Technician in the Division of Archives. There is some confusion over the time of plaintiff's application. At trial plaintiff testified that she applied for this position sometime in 1984. Plaintiff's post-trial memo dates this application event in December 1981. Defendant's memorandum refers to this position being at issue in February 1982. Plaintiff did offer into evidence the personnel card of Mr. Therold "Duke" Deese (plaintiff's exhibit Z10-A), the white male whom plaintiff testified received the position. Mr. Deese became a Records Mgmt. Technician in February 1982 and the Court will assume, despite plaintiff's contradictory testimony, that this is the time and position plaintiff meant.

Both Mr. Deese and plaintiff held positions as Microphotography Supervisor when they applied to be promoted to Records Mgmt. Technician. Plaintiff did have seniority over Deese, both in the Career Service and in tenure as a Microphotography Supervisor. Nonetheless, the defendant reiterated its claim to having hired the person thought to be most qualified. In support of this position, though not required to bear the burden of proof, the defendant introduced plaintiff's and Mr. Deese's applications (*see* defendant's exhibits 8c and 122k(3)) as well as testimony from plaintiff and Mr. Kassees. Plaintiff testified that her highest educational degree was a High School Diploma. Though her application shows 60 completed hours of college coursework, that was actually misleading. Plaintiff testified that she did not complete either of the two semesters she enrolled in college. Mr. Deese held an Associate of Arts Degree. In addition,

Deese had what appears to be an impressive history of job experience, including a year as a Records Supervisor for the Florida Marine Patrol. Plaintiff made no effort to rebut the defendant's offered explanation and therefore failed to sustain her burden of proof.

VII. Plaintiff Rosa Henderson

Plaintiff Rosa Henderson claimed to have been discriminatorily denied a Clerk III position in the Division of Elections in 1976 or 1977 which was awarded to an unknown white female. This claim is extremely vague and the Court finds that plaintiff failed to prove that she applied for a specific available position which was awarded to a non-minority person.

Plaintiff testified at trial that she was discriminatorily denied a Clerk III position in the Division of Corporations in 1977 which was awarded to Frieda Chesser. Plaintiff and defendant each stated in their respective post-trial memoranda that this position was awarded in 1978. The only testimony from plaintiff bearing on how her qualifications compared to Chesser's was that Chesser was already working in the Division of Corporations. That supports the defendant's contention that the person thought to be most highly qualified was hired, since Ms. Chesser would more likely be familiar with the work to be done. Plaintiff offered no evidence or testimony rebutting defendant's contention and thus failed to sustain her burden of proof.

Plaintiff testified she applied in 1977 for another Clerk III position in Corporations which went to an unknown person. Neither party mentions this claim in

their post-trial memo and the Court considers the claim abandoned.

Another claim asserted by plaintiff was for the position of Microphotographer in the Division of Archives, for which plaintiff testified she applied in 1978. Plaintiff's testimony that a white male named Gregory got this position for which she applied contradicted her deposition testimony that Louvenia Jones, a black female co-plaintiff, got the Microphotography Supervisor position for which plaintiff Henderson had applied. When recalled to the stand at the end of the trial, plaintiff contradicted all her earlier testimony and testified that Gary Reeves received this position. The plaintiff failed completely to produce sufficient credible evidence that she applied for an available position for which she was qualified and that it was awarded on the basis of race to a non-minority applicant. Furthermore, as to each of the persons whom plaintiff has testified received the job, plaintiff offered not one iota of evidence designed to rebut the defendant's claim to have hired the best qualified applicant. The defendant's motion for leave to late file an exhibit containing Gary Reeves' application and personnel card (doc 658) is DENIED AS MOOT.

Plaintiff Henderson testified that she applied in 1979 for a Clerk V position in the Division of Corporations which was awarded to Kevin St. Louis, a white male whose qualifications were unknown to plaintiff. Mr. St. Louis' qualifications for this position were discussed above in connection with the claim of plaintiff Diann Walker that she was discriminatorily denied this same position. Plaintiff Henderson has made no attempt to rebut the defendant's claim to have hired the person

thought to be most highly qualified and so her claim must fail.

Plaintiff testified that she applied in January 1980 for a Clerk V position in the Division of Corporations which went to Tony Fernandez. Plaintiff offered no evidence attempting to refute the defendant's position that the person thought to be most highly qualified was hired, not even a personnel card for Fernandez. In fact, Jay Kassees testified on behalf of the defendant that he could find no record of any Tony Fernandez ever having been employed at the Department of State. Assuming, without deciding, that plaintiff made out a prima facie case, she unquestionably failed to sustain the ultimate burden of proof.

Before addressing plaintiff's subsequent claims, the Court must review part of plaintiff's personnel history. Beginning in 1980, plaintiff received a series of conditional and unsatisfactory evaluations, primarily remarking on her poor attendance and bad attitude. Plaintiff was in fact demoted to Cashier in 1984 because of the continuing problem with her attitude. Plaintiff contends that her attitude was not bad, that she was given these low evaluations without justification because of her race. Rosa Henderson's bad attitude was apparent even in the Court room during the trial. The Court finds that these evaluations were not motivated by race and were properly considered when plaintiff Henderson applied for other positions.

Plaintiff testified that she applied next for the Clerk V position that became available when T. Fernandez was being replaced, sometime in 1980, and that the position

was awarded to Karon Beyer, a white female. The only evidence of Beyer's relative qualifications offered by plaintiff was her personnel card (plaintiff's exhibit S10-A). Although she had done some OPS work in Corporations, this Clerk V position was Mrs. Beyer's initial hire in the Career Service. Plaintiff has produced no evidence of what Karon Beyer's previous work experience or other qualifications were. Plaintiff has not rebutted defendant's position that the person thought to be most highly qualified was hired, particularly in view of the fact that Beyer was hired in July 1980 right after plaintiff received a six month evaluation rating of unsatisfactory (see defendant's exhibit 8I).

The next position concerning which plaintiff testified was that of Documentary Examiner in the UCC Section of the Division of Corporations. Plaintiff stated that this job was awarded to Irene Luttrell, a white female who had eight years less experience than plaintiff Henderson. In support of her claim that the defendant's contention that Luttrell was thought to be more highly qualified was a pretext for discrimination, plaintiff offered only Irene Luttrell's personnel card. Mrs. Luttrell's personnel card (plaintiff's exhibit S10-A) does indicate that she was first hired as a Data Entry Operator in the Division of Corporations in 1982. There is no need to address whether this evidence could be sufficient to refute the defendant's statement alone that the person thought to be most highly qualified was hired, because the defendant introduced into evidence Irene Luttrell's application (defendant's exhibit 285(a)). According to Mrs. Luttrell's application her work experience as a Secretary or in related positions began in 1944. Plaintiff Henderson wasn't even born until

December 1945, so her claim to eight years more experience than Luttrell is incredible. Plaintiff having failed to sustain the burden of proof, cannot prevail on this claim.

Plaintiff Henderson's last claim is over a Fiscal Clerk II position for which she applied in January 1986. Plaintiff testified that Cindy Summers, a white female, was hired and that Summers was a new hire without Department of State experience. In support of this claim, plaintiff offered Cindy Summers' personnel card. Miss Summer's was actually employed in November 1985. There is no evidence from which the Court can discern what Miss Summers' qualifications and previous work experience were. Therefore, plaintiff has failed to refute the defendant's claim to have hired the person thought to be most qualified.

VIII. Plaintiff Delores Colston

Plaintiff Delores Colston claims to have applied for an unknown number of Clerk-Typist IV, Secretary III and Secretary IV positions between 1974-1977. Plaintiff offered no testimony or evidence about who got these jobs, what their race was or what their qualifications were. The defendant asserts these claims are all time barred. Assuming, without deciding, that the claims are not time barred, plaintiff failed to make a prima facie case regarding any of these positions. There was no evidence what positions were available, which ones plaintiff actually applied for and what the race of the recipient was. All claims prior to 1977 of plaintiff Colston are denied.

In 1977 Delores Colston was discharged for disloyalty, insubordination and for physically fighting with her

superior, Liz Cloud. Plaintiff appealed her dismissal to the Career Service Commission, which held that it was not racially motivated and was justified. Plaintiff asks this Court to disregard the decision or the Career Service Commission and hold that her discharge was racially motivated. The defendant, without citing any authority, says that the Commission's determination is res judicata on the question of plaintiff's discharge. The Supreme Court has recently held that the findings of a State Administrative Agency, made after a hearing at which the parties had a full opportunity to litigate their claims, are not entitled to full faith and credit in a subsequent federal court Title VII action but may have both issue and claim preclusive effect in subsequent actions under 42 U.S.C. §1983. *University of Tennessee v Elliott*, 54 U.S.L.W. 5084 (July 7, 1986). Plaintiff's third amended complaint (doc 203) recites claims under both Title VII and §1981 and §1983. The preclusive effect, if any, of the prior State hearing need not be further explored since this Court is independently in full accord with that decision that race discrimination played no part in the discharge of plaintiff. It is the determination of this Court that plaintiff's discharge was not racially motivated and was justified by her actions in physically fighting with Liz Cloud.

Plaintiff claims to have been discriminatorily denied several positions after her 1977 discharge. Specifically, plaintiff claims to have applied for a Clerk-Typist III position in July 1978. Plaintiff's counsel read into the record from plaintiff's exhibit Z33 that the chosen applicant was a white female, T. Levy. Plaintiff claimed to have applied in August 1979 for an Audio-Visual Technician

job, which plaintiff's counsel stated went to A. Tyson. Plaintiff asserts a claim over a Clerk-Typist III position for which she applied in August 1979. The Court has no recollection of anyone ever testifying about who received this position. In her written post-trial memorandum plaintiff states that this position was awarded to C. German, a white female. Plaintiff also claims to have been discriminatorily denied a Secretary III Position in August 1979 which went to J. Beach, a white female, and a Secretary IV position in August 1981 which was awarded to V. Musgrove, also a white female. Assuming, without deciding, that plaintiff met her prima facie burden to establish that she applied, and was qualified for, an available position which was awarded to a non-minority applicant, as to each and every one of these positions the plaintiff failed to offer any evidence to rebut the defendant's claim to have hired the best qualified person. Furthermore, plaintiff did not admit to the reasons for her earlier discharge on these subsequent applications. The Court specifically finds that the circumstances of her discharge, taken together with plaintiff's failure to be truthful about it in later applications, fully justified the defendant's decision not to rehire plaintiff Colston.

IX. Intervenor Linda Isaac

Ms. Isaac claims to have been discriminatorily denied initial hire into six positions. The first of these was a Clerk I job, for which the intervenor says she applied in September 1977. Linda Isaac testified that she had previously been employed at Tallahassee Memorial Hospital for five years as a Clerk-Typist II and was qualified for the Clerk I position. Ms. Isaac never said who received

the job. Counsel identified D. Nichols, purportedly a white male, as the recipient of this job. Intervenor has not supplied any evidence concerning the qualifications of this selectee or otherwise demonstrating an impermissible racial motive in the hiring decision. The Court notes that the defendant has provided a copy of a personnel card and application for Diane Nichols, a white female, who does appear to have been awarded that job. Nothing in this evidence contradicts the defendant's statement that the person believed to be best qualified was hired.

Isaac alleged she was discriminatorily denied a Clerk II position for which she applied in September 1977. Counsel identified Anne Hartsfield, a white female, as the recipient of the job. Once again, no evidence of any kind was offered by the intervenor to show that it was a pretext for discrimination when the defendant claimed to have hired the person believed to be most qualified. Even when the defendant produced Mrs. Hartsfield's personnel card and application (defendant's exhibit 306) the intervenor failed to do any meaningful comparison of their relative qualifications.

Linda Isaac claimed to have been discriminatorily denied two Clerk III positions, the first of which she applied for in October 1977 and the second in March 1979. Ms. Isaac did not name the persons who received those jobs. Counsel claimed that J. Bishop and H. Balogh (both purportedly white males) were the successful applicants. For the second time, counsel would appear to have been misinformed concerning the sex of a person hired in preference to intervenor Isaac. The defendant supplied personnel cards and applications of Jane Bishop (a white female) (defendant's exhibit 302) and Howard Balogh

(defendant's exhibit 304) in support of its claim that the persons believed to be most qualified were hired. The intervenor has made no attempt to rebut the defendant's explanation, and so she has failed to sustain her burden of proof.

Intervenor Isaac asserts she was discriminatorily denied a Clerk V position in July 1980. Counsel for Ms. Isaac identified the successful candidate as Karon Beyer. The Court notes that co-plaintiff Rosa Henderson also claims to have been discriminatorily denied this position. As stated in connection with that claim, the only evidence these claimants have offered concerning Beyer's qualifications was her personnel card (plaintiff's exhibit S10-A). Although she had done some OPS work, this Clerk V position was Mrs. Beyer's initial hire in the Career Service. Without any evidence of Mrs. Beyer's previous work experience or other qualifications the intervenor cannot sustain her burden of proof. The defendant has supplied a copy of Karon Beyer's application (defendant's exhibit 122I(q)(2). Mrs. Beyer held a B.S. degree and had previous responsible experience as a store manager. Linda Isaac has not even attempted to refute defendant's explanation.

Finally, intervenor Isaac claims to have been discriminatorily denied a Clerk V position in August 1980. According to Isaac's counsel, that position went to H. Allen, a white male. Henry Allen's personnel card (plaintiff's exhibit S10-A) supports the defendant's claim to have hired the person thought most qualified. Mr. Allen was continuously employed in progressively responsible positions at the Department of State from April 1978. In further support of its position, the defendant has placed

in evidence Mr. Allen's application (defendant's exhibit 92). Intervenor Isaac cannot prevail without even having attempted to sustain her burden of proof and rebut the defense.

X. Intervenor Jacquelyn Ross

Intervenor Ross raised two claims at trial. First, Ross asserted she was discriminatorily denied a Secretary III position for which she applied in January 1979. The intervenor didn't know who got this job, but Ross' counsel stated Mary Brantley, a white female, was hired. Intervenor Ross offered no evidence whatsoever attempting to refute the defense claim of having hired the most qualified person. In support of its position, the defendant offered Mary Brantley's personnel card and application (defendant's exhibit 305). Ms. Brantley was employed at the Florida House of Representatives for 10 years in progressively responsible positions, all higher than Secretary III. Brantley's resume indicates she progressed from Secretary IV to Executive Secretary I to Staff Ass't I before becoming a self-employed court reporter. The intervenor has failed to prove that impermissible racial considerations played any part in this hiring decision.

At trial intervenor Ross also testified she was discriminatorily denied a Clerk-Typist III position in January 1980 but that she didn't know who got the job. This position is not even mentioned in intervenor's written post-trial memorandum. Jacquelyn Ross failed to make a prima facie case and abandoned this claim.

XI. Conclusion

In accordance with all of the foregoing it is the judgment of this Court that plaintiffs and intervenors take nothing by this action and let judgment enter for defendant. Jurisdiction is reserved for purposes of considering motions for attorneys fees and costs, should any be timely filed.

DONE AND ORDERED this 11th day of August, 1986.

/s/ Maurice M. Paul
United States District Judge

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the district Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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§ 1331. Federal questions

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§ 2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) the term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151

et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the

preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

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§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of

individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

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§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any

individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or

employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such

school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be

performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quality or quality of production or to employees who work in different locations, provided that such diffeerences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or

to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community,

State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating

to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Federal Rules of Evidence Rule 301

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Federal Rules of Evidence Rule 1001-1005

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recordings, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be

correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Federal Rules of Civil Procedure 52(a)

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, the judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Respectfully submitted,

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